No. 80-1304

MAR 13 1981
ALEXANDER L. STEVAS

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

PAGE AIRWAYS, INC., *et al.*,
Petitioners,

v.

ASSOCIATED RADIO SERVICE CO.,
Respondent.

REPLY TO RESPONSE TO PETITION FOR A WRIT OF CERTIORARI

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Respondent Associated does not deny the importance of the antitrust questions presented in the Petition for Certiorari. Instead, Associated asserts that Page has waived its right to raise these legal objections. According to Associated, Page tried to convince the trial judge to give jury instructions that are substantially the same as those to which Page now objects. However, as we show below, the issues presented in the Petition are not last-minute contrivances of counsel; they are, in fact, the basic legal propositions upon which Page has insisted from the beginning of this litigation. The trial judge and the Court of Appeals were fully informed of the legal positions Page was asserting, and these positions were rejected as a matter of law by the lower courts. Accord-

ingly, the issues set forth in the Petition are properly before this Court and are ripe for resolution.[1]

I. *Market Definition Issue*

Although Associated asserts in passing that the market definition instruction below was correct because it incorporated language from this Court's *Brown Shoe* opinion,[2] the Response does not deny that the issues presented in the Petition are important ones deserving resolution by this Court. In particular, the Response does not deny that *Brown Shoe's* listing of potentially relevant market definition criteria has frequently led lower courts, as in this case, to give instructions that simply parrot the list and make no attempt to indicate the economically crucial issues pertinent to the case at hand.[3] Instead, the Re-

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[1] Associated also accuses Page of misstating the facts. While we reject that accusation, we do not go into the matter here. This case turns on significant questions of law, not disputed issues of fact. We note, however, that Associated does not even attempt to document its assertion that Page's factual recitation is wrong.

[2] *Brown Shoe Co.* v. *United States*, 370 U.S. 294 (1962).

[3] Associated suggests that Page is exaggerating the significance of supplier substitutability and that its view is at odds with "*Brown Shoe* and its progency," citing only *Heatransfer Corp.* v. *Volkswagenwerk, A.G.*, 553 F.2d 964 (5th Cir. 1977), *cert. denied*, 434 U.S. 1087 (1978) and *Pacific Coast Agricultural Export Ass'n.* v. *Sunkist Growers, Inc.*, 526 F.2d 1196 (9th Cir. 1975), *cert. denied*, 425 U.S. 959 (1976). Response at 8. Associated, however, completely ignores footnote 42 of *Brown Shoe* and all the cases that hold that where a high degree of supply/production substitutability exists, the relevant market must include all the interchangeable products. *See* Petition at 10-13, n. 11 and n. 14. Instead, Associates, selects for citation (without discussion) two totally inapposite cases. In *Heatransfer*, the jury was explicitly told to consider questions of production substitutability, framed in the context of the facts at issue therein, Charge to the Jury at 32-35, *Heatransfer Corp.* v. *Volkswagenwerk, A.G.*, 1975-1 Trade Cas. ¶ 60,309 (S.D. Tex., April 25, 1975), and therefore the adequacy of the jury charge was not challenged in either the Court

sponse asserts that, however important the issues might be, they are not properly presented in this case.

This assertion is flatly wrong. Page did all it is required to do—and more—to preserve the issues set forth in the Petition. Under Rule 51 of the Federal Rules of Civil Procedure, a party may challenge an error or omission in a jury instruction as long as he has objected to the instruction at issue, stating his objection with sufficient specificity "to inform the trial judge of possible errors so that he may have an opportunity to correct them." 5A Moore's Federal Practice ¶ 51.04 at 51-30 to 51-35 (2d ed. 1948). *See, e.g., Palmer* v. *Hoffman*, 318 U.S. 109, 119 (1943); *Maheu* v. *Hughes Tool Co.*, 569 F.2d 459, 470 (9th Cir. 1977); *Cohen* v. *Franchard Corp.*, 478 F.2d 115, 122 (2d Cir.), *cert. denied*, 414 U.S. 857 (1973). A party need not propose a perfect instruction; all that is required is that, either through proposed instructions or specific objections, the party make its legal position clear so that the judge has an opportunity to make an informed decision. *Sunkist Growers Inc.* v. *Winkler & Smith Citrus Products Co.*, 370 U.S. 19, 26-27 (1962); *Florists' Nationwide Telephone Delivery Network* v. *Florists' Telegraph Delivery Assn.*, 371 F.2d 263, 270 (7th Cir.), *cert. denied*, 387 U.S. 909 (1967). *See also* 5A Moore's Federal Practice ¶ 51.04 at 51-28 (2d ed. 1948).[4]

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of Appeals or the Petition for a Writ of Certiorari. Similarly, in *Pacific Coast Agricultural Export Ass'n.*, there was no dispute regarding user and supplier substitutability or the adequacy of the market instruction; the issue was simply whether plaintiff had charged defendant with monopolizing the production market or the distribution market.

[4] Even where a party initially offers erroneous instructions to the court, he can challenge those instructions on appeal if he recognized the error and sought to rectify it by filing an objection before the jury retired. *See, e.g., General Beverage Sales Co.* v. *East-Side Winery*, 568 F.2d 1147, 1154 (7th Cir. 1978); *Alabama Great S. R.R.* v. *Johnson*, 140 F.2d 968, 972 (5th Cir. 1944); *See also* Wright and Miller, *Federal Practice and Procedure: Civil*, § 2558, at 675-76 (1971).

Page could hardly have made its position clearer in this case. It stressed repeatedly that instructions that failed to emphasize the crucial importance of supplier substitutability and that simply recited the *Brown Shoe* factors were inadequate. Page's proposed charge of July 29, 1977, submitted prior to the close of the evidence, focused exclusively on supplier substitutability:

> Therefore, in this case the 'relevant product or service market' concerns that group of aircraft outfitters who either compete with Page and Associated Radio Service Company and each other, or who are capable of so competing, if they desired to obtain contracts, for the complete installation of avionics in Grumman G-II aircraft. The test of whether or not a given outfitter is in the 'market' is not whether he has actually ever done any G-II work or not; the test is whether he is an available substitute who could do the work if those presently doing it should raise their prices unreasonably or otherwise act in an unreasonable manner so as to cause the G-II owner to shop around for someone else to do his work. CA App. at 2392.[5]

Page cited two cases in support of this requested instruction, both supplier substitutability cases.[6] Significantly, Page did not cite *Brown Shoe* or mention the *Brown Shoe* factors.

It was the judge who first utilized the *Brown Shoe* factors, incorporating them in his August 5 proposal, CA App. 2514-A to 2514-G, and Page tried hard to point out the inadequacies of this approach. Responding to the judge's introduction of the submarket concept, Page objected:

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[5] Appendix references are to the Joint Appendix in the Court of Appeals (CA App.) or to Appendix A of the Appendices to Petition for a Writ of Certiorari (App. A).

[6] *Telex Corp.* v. *IBM Corp.*, 510 F.2d 894 (10th Cir.), *cert. dismissed*, 423 U.S. 802 (1975); *Yoder Bros., Inc.*, v. *California-Florida Plant Corp.*, 537 F.2d 1347 (5th Cir. 1976), *cert. denied*, 429 U.S. 1094 (1977). *See* CA App. at 2393.

> Defendants submit that the description of the legal requirements for a sub-market are incomprehensible and wholly insufficient to permit the jury to understand the concept involved. Moreover, the Defendants submit that there is insufficient evidence of any sub-market and object to the charge in that regard.[7]

Responding to the judge's confused attempt to deal with supplier substitutability, Page noted:

> The issue is not as posed on page 27 whether an outfitting company that specializes in one aircraft would be interested in switching to another aircraft, but rather, under the applicable law, the issue is whether such an outfitter reasonably could switch to providing service in a different aircraft.[8]

Having made its legal position abundantly clear, Page nevertheless had to protect itself should the trial judge persist in his errors. Page accordingly proposed an alternative on August 9, "without in any way waiving [its] previous requests in [the July 29] proposed charge." CA App. at 2518. This alternative, essentially a variation on the theme established by the judge, employed the *Brown Shoe* factors; but it emphasized looking "at the production side" and incorporated almost verbatim, as the concluding few paragraphs, Page's July 29 supplier substitutability instruction. CA App. at 2518-27.

When the judge ultimately gave up his attempt to go beyond *Brown Shoe* and decided simply to recite the abstract *Brown Shoe* factors, Page objected vehemently: "Defendants object to Instruction No. 39 [the instruction ultimately given] because, as drafted, it is wholly meaningless and confusing in that it fails to define the considerations which go into determining the relevant market in any way which may be understood by the jury." CA

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[7] Defendants' Response and Objections to Preliminary Jury Charge (August 9, 1977) at 13-14.

[8] *Id.* at 15, CA App. at 2534.

App. at 2573. Page requested that the judge either adopt Page's requested charge of August 9 or go back to his earlier proposed charge, both of which dealt specifically with supplier substitutability. *Id.* The judge refused.

In light of these efforts, it is hard to imagine how Page could have made clearer to the judge its belief that his market definition instruction was inadequate or could have given him a greater number of opportunities to correct the deficiencies.[9] No more was required.

Thus, Associated's assertion that Page's legal arguments on supplier substitutability are an afterthought, made in view of Page's alleged failure to submit sufficient evidence on other supposedly relevant factors (Response at 8-9), is wrong on all counts. Page always contended—as the Petition now argues—that supplier substitutability should have been the crucial issue on the facts of this case, and that in any event a boiler-plate listing (without more) of all the factors mentioned in *Brown Shoe* provided inadequate guidance to the jury. That issue is properly presented and deserves resolution by this Court.

II. *Restraint of Trade Issue*

Associated next argues that since the Fifth Circuit rejected the *Pick-Barth per se* standard and purported to require some assessment of the impact of Page's actions on competition, there is no real conflict among the Circuits. But Associated ignores the Fifth Circuit's unique two-part test for "unfair competition cases under section 1 of the Sherman Act." App. A at 16a; 624 F.2d at 1351. That test, as the Petition points out, requires proof

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[9] It should be noted that Page's Motions for a Directed Verdict, based *inter alia* on the fact that supplier substitutability dictated a broader market than Plaintiffs were proposing, also alerted the trial judge to Page's legal position. *See* CA App. at 2362 and 2538.

of only a potential impact upon competition. The test is fundamentally different from the test prevailing in other Circuits under which plaintiffs must show an actual, often substantial, adverse effect. *See* Petition at 23, n.30.[10]

Associated further claims (as it did in relation to the market definition issue) that Page has failed to preserve its right to object to this error. Associated contends that the instructions given by the trial court on this issue were "substantially similar" to those requested by Page and thus any errors in them were invited. The contention is false.

In support of its argument, Associated quotes two sentences from Page's proposed charge of August 9. Response at 10, n. 4. But these two sentences cannot be read in isolation. The rest of the proposed instruction—*i.e.*, the next four paragraphs—clearly would have required that the jury find actual injury to competition.[11] Moreover, from its first motion to dismiss this case, Page

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[10] Associated discusses only one of the five cases described in footnote 30. That case, *Juneau Square Corp.* v. *First Wisconsin National Bank of Milwaukee*, 624 F.2d 798 (7th Cir.), *cert. denied*, 101 S. Ct. 571 (1980), does not support Associated's position. There, the court specifically held that "[a]n adverse effect upon competition, however small, is the distinguishing characteristic of a restraint of trade in contrast to a business tort. . . . Plaintiffs must show [for a restraint of trade] that the 'effect upon competition in the marketplace is substantially adverse.'" 624 F.2d at 810-11. Respondent does not even attempt to document its conclusory assertion that the four other cases described in footnote 30, representing four other Circuits, do not conflict with the present case.

[11] These paragraphs would have required the jury to "consider whether the level of competition then existing was diminished" by the challenged conduct. CA App. at 2529. They would have specifically instructed the jury that merely substituting one competitor for another, while possibly injurious to the displaced competitor, did not by itself constitute injury to competition. Further, they would have focused the jury's attention on crucial questions of price and service competition. CA App. at 2528-30.

had been insisting that only actual injury to competition constituted a violation of section one of the Sherman Act.[12] Thus, to the extent that there was ambiguity in Page's August 9 proposal, it could not have misled the judge as to Page's position.

In reality, the chronology suggests that it was Associated (not Page itself) who proposed that the judge insert the language to which Page objects. In his proposed charge of August 18, the judge had adopted the last four paragraphs of Page's August 9 proposed charge, *i.e.*, the paragraphs that directed the jury to look for an actual adverse effect on competition. He did not include the "tendency" language Associated quotes from Page's August 9 proposal. It was Associated who, arguing that Page had "successfully led this Court down the path of error," CA App. at 2562, urged the judge to go back to an earlier version and specifically to insert the "tendency" language that ultimately appeared in the jury charge.[13]

But without regard for where the "tendency" language originated, the significant fact is that after the judge retreated and dropped Page's suggestions to look at actual injury, Page's objections to the judge's final jury charge could not have been clearer or more direct:

> Instruction No. 37 waters down the "restraint effect" requirement to mean merely "*tending to*," whereas Plaintiffs' burden is to show that an unreasonable restraint *actually occurred.* CA App. at 2572 (emphasis added).

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[12] *See* the Motions to Dismiss and Motions for a Directed Verdict at CA App. at 2019, 2243, 2274, 2362, 2538.

[13] Associated proposed that the judge add the following language:

> Before it can be said that the conduct of the Defendants is forbidden as unreasonably restraining trade or commerce within the meaning of the Sherman Act, it must appear that such *conduct tends or is reasonably calculated to prejudice the public interest.* CA App. at 2562 (emphasis added).

Page further objected to the fact that the court had "wholly ignored the requirement [that the] 'test of antitrust legality of such a restraint is whether *the effect upon competition in the market place is substantially adverse.*'" CA App. at 2573 (emphasis in original), quoting a Fifth Circuit case.[14]

Thus, from its first motion to dismiss, through its motions for a directed verdict, until its final effort to help the judge frame an adequate instruction, Page had made it abundantly clear that antitrust liability requires evidence of an actual adverse impact on competition, not a mere tendency or potential to hurt competition. This issue, like the market definition issue, was properly preserved. It can and should be resolved by this Court.

III. *Section Two Issue*

The Petition's Section Two issue is straightforward. The Court of Appeals found that Page's alleged bad acts, "taken together," constituted sufficient evidence to support liability under Section Two; each of the individual acts would not alone have been enough. The Court, however, overlooked the fact that the jury may have found that Page only committed one or two of the bad acts and nevertheless found liability. That being so, it was clearly error to affirm. Page pointed out this error to the Court of Appeals in the first and only opportunity it had to do so, the Petition for Rehearing and Suggestion for Rehearing En Banc, at 20-22. While this error may not by

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[14] Page specifically objected to the court's elimination of the instructions that indicated that injury to Plaintiffs did not necessarily constitute injury to competition and that no unreasonable restraint results (1) if the level of competition in the relevant market remained the same or increased or (2) if the only result of the defendants' actions was the substitution of a new competitor for an existing one. CA App. at 2573.

itself warrant the issuance of a Writ of Certiorari, we urge this Court, if it grants the Petition, to require the Court of Appeals to correct its obvious mistake.[15]

CONCLUSION

For the reasons set forth above and in the Petition, a Writ of Certiorari should issue to review the Judgment and Opinion of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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[15] Some of Page's suggested jury interrogatories, rejected by the trial court, were addressed to the occurrence *vel non* of each bad act. Had the interrogatories been submitted, the Court of Appeals could have ascertained on what factual basis the jury's verdict rested. The fact that the interrogatories were proffered in the context of Section One interrogatories is irrelevant. If they had been asked and answered, the Fifth Circuit would have been able to tell whether, on its view of the law, the jury verdict was supportable. As it is, no such conclusion is possible.